

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALAN SUKIN,

No C 07-2829 VRW

Plaintiff,

ORDER

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, STATE FARM
INSURANCE COMPANIES, THE
COMMISSIONER OF THE CALIFORNIA
DEPARTMENT OF INSURANCE, and DOES
1-50,

Defendants.

_____ /

Plaintiff Alan Sukin ("Sukin") filed a complaint in California superior court against defendants State Farm Mutual Automobile Insurance Company and State Farm Insurance Companies (collectively "State Farm"), alleging that State Farm wrongfully denied disability benefits due Sukin under his State Farm policy after Sukin became disabled from his occupation as a network architect/project manager. Sukin also brought claims against the

1 California Department of Insurance ("DOI") for its approval of the
2 policy language at issue. On May 31, 2007, State Farm filed a
3 notice of removal with this court, contending that DOI was
4 fraudulently joined. Doc #1. Sukin moves to remand (Doc #14) and
5 State Farm's moves to dismiss the complaint. Doc #3. For reasons
6 discussed below, the court, GRANTS Sukin's motion to remand and
7 TERMINATES State Farm's motion to dismiss.

8
9 I

10 The facts that follow in section A are taken from Sukin's
11 complaint. Doc #1, Ex 1.

12 A

13 State Farm issued a disability insurance policy ("the
14 policy") to Sukin on August 18, 2000. Id ¶6, Ex A. On December
15 27, 2002, Sukin slipped and fell on a wet floor, resulting in
16 severe and permanently disabling injuries to his cervical spine and
17 upper back as well as carpal tunnels in both wrists. Id ¶10.
18 Sukin made a claim for total disability benefits under the policy
19 on March 15, 2003. Id ¶11. Under the policy, "Total Disability or
20 Totally Disabled means complete incapacity, as the result of your
21 Injury or Sickness: (1) to perform the major, substantial or
22 material duties pertaining to an occupation as defined herein for
23 remuneration or profit [and] (2) which requires the regular care of
24 a Physician other than yourself." Id ¶7, Ex A at 6.

25 On March 18, 2003, State Farm informed Sukin that he
26 could not receive benefits under the policy because he was already
27 on disability under a separate mortgage disability insurance
28 policy. Id ¶13. State Farm informed Sukin again on March 15, 2004

1 that Sukin could not receive benefits under the policy. Id ¶14.
2 State Farm failed to pay Sukin any benefits under the policy until
3 August 25, 2005. Id ¶15.

4 B

5 On April 20, 2007, Sukin filed a complaint in San
6 Francisco superior court alleging that State Farm misrepresented
7 the policy provisions. Sukin brought claims for breach of
8 contract, breach of the covenant of good faith and fair dealing,
9 intentional misrepresentation and intentional infliction of
10 emotional distress against State Farm. Sukin also brought a claim
11 for writ of mandamus against DOI, contending that the Commissioner
12 of DOI should not have approved the relevant policy language
13 because it was ambiguous and at variance with the minimum
14 requirements of the California Insurance Code with respect to
15 policy definitions of disability.

16 State Farm removed the action to this court on May 31,
17 2007 on the basis of diversity of citizenship alleging that Sukin
18 fraudulently joined DOI to destroy diversity jurisdiction. Doc #1
19 Sukin is a resident of California. Id. State Farm is an Illinois
20 corporation. Id. Along with its notice of removal, State Farm
21 filed a motion to dismiss the complaint. Doc #3. Sukin filed a
22 motion to remand on July 2, 2007. Doc #14.

23
24 II

25 An action may be removed to federal court if it could
26 have been brought there originally. 28 USC § 1441. In order to
27 establish diversity jurisdiction, the removing defendant must
28 demonstrate that: (1) all plaintiffs are of different citizenship

1 from all defendants and (2) the amount in controversy, exclusive of
2 interest and costs, exceeds the current jurisdictional minimum of
3 \$75,000. See 28 USC § 1332(a); see also Singer v State Farm Mut
4 Auto Ins Co, 116 F3d 373, 376 (9th Cir 1997).

5 The party opposing a motion to remand has the burden to
6 demonstrate the existence of federal jurisdiction. See Emrich v
7 Touche Ross & Co, 846 F2d 1190, 1195 (9th Cir 1988). Because the
8 removal statute, 28 USC § 1441, is strictly construed against
9 removal, any doubt regarding the propriety of removal must be
10 resolved in favor of remand. See Plute v Roadway Package System,
11 Inc, 141 F Supp 2d 1005, 1007 (ND Cal 2001) (citing Boggs v Lewis,
12 863 F2d 662, 663 (9th Cir 1988)).

13 "A district court may disregard a non-diverse party
14 named in the state court complaint and retain federal jurisdiction
15 if the non-diverse party is joined as a sham or if the joinder is
16 fraudulent." Plute, 141 F Supp 2d at 1007. "There is a
17 presumption against finding fraudulent joinder, and defendants who
18 assert that plaintiff has fraudulently joined a party carry a heavy
19 burden of persuasion." Id, citing Nishimoto v Federman-Bachrach &
20 Assocs, 903 F2d 709, 712 n3 (9th Cir 1990); Emrich v Touche Ross &
21 Co, 846 F2d 1190, 1195 (9th Cir 1988). "[A] defendant will be
22 deemed to have been fraudulently joined if, regardless of
23 plaintiff's motive or good faith, plaintiff has no chance of
24 succeeding in its claim against the challenged defendant." Morris v
25 Princess Cruises, Inc, 236 F3d 1061, 1067-68 (9th Cir 2001).

26 "In deciding whether a cause of action is stated we have
27 declared that we will look only to a plaintiff's pleadings to
28 determine removability. * * * [But w]here fraudulent joinder is an

1 issue, we will go somewhat further. The defendant seeking removal
2 to the federal court is entitled to present the facts showing the
3 joinder to be fraudulent." Ritchey v Upjohn Drug Co, 139 F3d 1313,
4 1318 (1998) (internal quotation marks and citations omitted). The
5 posture of an opposition to a motion for remand based on a
6 fraudulent joinder theory is thus similar to the posture on a
7 motion for summary judgment. See Morris, 236 F3d at 1068. A
8 defendant may demonstrate fraudulent joinder factually, because if
9 it would be appropriate to grant summary judgment on the sham
10 defendant's claim, then the removing defendant has demonstrated
11 that "the individuals joined in the action cannot be liable on any
12 theory." Ritchey, 139 F3d at 1318. Any ambiguities or contested
13 issues of fact must be resolved in plaintiff's favor. Travis v
14 Irby, 326 F3d 644, 649 (5th Cir 2003).

16 III

17 State Farm does not dispute that an insured who is denied
18 benefits under an allegedly ambiguous policy can petition for writ
19 of mandamus to compel DOI to revoke approval of the policy. See
20 Brazina v Paul Revere Life Ins Co, 271 F Supp 2d 1163 (ND Cal
21 2003):

22 This court finds that Brazina's petition for a writ of
23 mandamus to challenge the DOI Commissioner's approval of the
24 insurance policy language under section 10291.5 of the
25 California Insurance Code is a viable cause of action.
26 Section 10291.5 gives the Commissioner the duty and power to
27 approve disability insurance policies. Subparagraph (b)(1)
28 provides that "[t]he commissioner shall not approve any
* [i]f the commissioner finds that it contains any provision *
* * which is unintelligible, uncertain, ambiguous, or
abstruse, or likely to mislead a person to whom the policy is
offered, delivered or issued." Cal Ins Code § 10291.5(b)(1).

1 The Commissioner's decision is subject to judicial review in
2 accordance with the California Code of Civil Procedure. Cal
Ins Code § 10291.5(h).

3 Brazina at 1167. Rather, State Farm argues that DOI is a sham
4 defendant because Sukin's claim against DOI is untimely. Doc #20.

5 "Ordinarily, courts do not consider a nondiverse
6 defendant's defenses on the merits in determining whether that
7 defendant's joinder was 'fraudulent.'" William W Schwarzer, A
8 Wallace Tashima, James M Wagstaffe, Federal Civil Procedure Before
9 Trial, § 2:672.2 (Rutter Group, 2007) (citing Ritchey v Upjohn Drug
10 Co, 139 F3d 1313, 1318-19 (9th Cir 1998). The result is different
11 where under state law the defense is a procedural bar to the action
12 regardless of its merits, such as the statute of limitations under
13 California law. Id. In Ritchey, the Ninth Circuit found that a
14 statute of limitations bar constituted fraudulent joinder. Id at
15 1320. The Ritchey court concluded that "under California law no
16 cause of action was stated" because the statute of limitations is a
17 "kind of procedural bar, and not one which relates to the merits of
18 the case," and because defendants may file a demurrer in state
19 court based on the statute of limitations. Id at 1319-20. This
20 court finds that even under Ritchey, the defenses asserted by State
21 Farm fail to establish fraudulent joinder.

22 A

23 State Farm argues that Sukin's claim against DOI is
24 untimely under Cal Ins Code § 10291.5(h), Cal CCP § 1094.6 and Cal
25 CCP § 338(a). Doc #1 at 3-4. The court addresses each code
26 section below.

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1 Cal Ins Code § 10291.5(h) states:

2 [A]ny action taken by the commissioner under this section is
3 subject to review by the courts of this state and proceedings
4 on review shall be in accordance with the Code of Civil
5 Procedure.

6 Notwithstanding any other provision of law to the contrary,
7 petition for any such review may be filed at any time before
8 the effective date of the action taken by the commissioner.
9 No action of the commissioner shall become effective before
10 the expiration of 20 days after written notice and a copy
11 thereof are mailed or delivered to the person adversely
12 affected, and any action so submitted for review shall not
13 become effective for a further period of 15 days after the
14 filing of the petition in court.

15 Cal Ins Code § 10291.5(h) (emphasis added). Here, the Commissioner
16 approved the policy language at issue in Sukin's policy on January
17 17, 1995. Doc #1 at 3, Ex 3. Pursuant to Cal Ins Code
18 § 10291.5(h), that approval became effective not more than 20 days
19 later, i e February 6, 1995. Accordingly, State Farm argues,
20 Sukin's complaint, filed on April 20, 2007, is more than 12 years
21 late. Doc #1 at 4.

22 The court disagrees. In Brazina, supra, Judge Patel of
23 this district addressed the identical argument. Brazina involved
24 an insurance bad faith claim arising under California law. The
25 insured brought suit against the insurer and also named DOI as a
26 defendant, asserting claims for a writ of mandamus and declaratory
27 relief, contending that the Commissioner should not have approved
28 the pertinent policy language. The insurer removed the case, and
the insured moved for remand. Judge Patel ordered remand first
finding that a petition for mandamus against DOI was a valid cause
of action. Judge Patel also addressed and rejected the insurer's
argument that the limitations period provided by Cal Ins Code

1 § 10291.5(h) had passed. The court found that the language of the
2 statute was "permissive" and not mandatory and that there was no
3 need to challenge the Commissioner's action prior to the effective
4 date of the action:

5 [S]ection 10291.5 provides that a petition may be filed before
6 the effective date. In fact, it seems likely that a
7 California court would interpret the language to allow this
8 action to proceed. A recent appellate decision determined
9 that almost identical statutory language in another section of
10 the Insurance Code simply provides an alternative means of
11 review. * * * Noting that California courts are ordinarily
12 unable to review an action that is not final, the court found
13 that the "permissive" language of the provision created "an
14 opportunity for review" of such actions. The provision did
15 not, however, bar plaintiffs from petitioning for a writ of
16 mandamus thereafter.

17 Brazina at 1170-71 (citations omitted). Accordingly, Sukin's claim
18 against DOI is not untimely under Cal Ins Code § 10291.5(h).

19 Cal CCP § 1094.6 governs "judicial review of any decision
20 of a local agency" and states that "such petition shall be filed
21 not later than the 90th day following the date on which the
22 decision [of the agency] becomes final." Because the
23 Commissioner's approval of the policy became effective on February
24 6, 1995, State Farm argues, Sukin had until May 7, 1995 to bring
25 his petition for mandamus. Doc #20 at 4. Again, the court
26 disagrees. As Sukin points out, Cal CCP § 1094.6 pertains solely
27 to judicial review of the act of a "local agency." DOI is not a
28 local agency. See Cal Gov Code § 54951 ("'[L]ocal agency' means a
county, city, whether general law or chartered, city and county,
town, school district, municipal corporation, district, political
subdivision, or any board, commission or agency thereof, or other
local public agency.")

\\

1 State Farm's above two arguments fail for an independent
2 reason. As Sukin points out, a plaintiff must have standing before
3 bringing an action in California court. Doc #14 at 8.

4 Every action must be prosecuted in the name of the real party
5 in interest, except as otherwise provided by statute. The
6 issue of whether a party has standing focuses on the
7 plaintiff, not the issues he or she seeks to have determined.
8 A person who invokes the judicial process lacks standing if
9 he, or those whom he properly represents, does not have a real
10 interest in the ultimate adjudication because [he] has neither
11 suffered nor is about to suffer any injury of sufficient
12 magnitude reasonably to assure that all of the relevant facts
13 and issues will be adequately presented.

14 Blumhorst v Jewish Family Services of Los Angeles, 126 Cal App 4th
15 993, 1001 (2005) (citations and internal quotes omitted). Here,
16 Sukin did not acquire the policy until August 18, 2000 and was not
17 denied coverage until March 18, 2003. Doc #1, Ex 1. Accordingly,
18 State Farm's position that Sukin was required to bring his claim
19 against DOI in 1995 is untenable. Under California's standing
20 requirements, the earliest date on which Sukin could have brought
21 his claim was March 18, 2003.

22 State Farm next argues that Sukin's claim against DOI is
23 time-barred under Cal CCP § 338, which creates a three-year
24 limitations period for "an action upon a liability created by
25 statute." As discussed above, Sukin's claim against DOI is
26 premised on Cal Ins Code § 10291.5, which subjects the Commissioner
27 to judicial review over his approval of insurance policies.
28 Accordingly, State Farm argues, Sukin was required to bring his
claim against DOI within three years of February 6, 1995. Doc #20
at 6. This is incorrect. As discussed above, Sukin did not have
standing to bring this action until March 18, 2003 at the earliest.
See also Sullivan v Unum Life Ins Co of America, 2004 WL 828561, 4

1 (ND Cal) ("It seems unfair to hold categorically that Plaintiff had
2 notice of the way defendants would administer the policy before
3 [defendant insurer] denied him benefits.")

4 B

5 State Farm argues in the alternative that, even if the
6 three-year period under Cal CCP § 338(a) started to run as of the
7 date that coverage was denied, Sukin's claim would still be
8 untimely. State Farm first denied coverage on March 18, 2003. But
9 Sukin did not file his complaint until April 20, 2007, over four
10 years later. Apparently in recognition of this defect, Sukin
11 included the following statement in his complaint:

12 During the adjustment of Plaintiff's disability insurance
13 claim, from March 15, 2003 through the present, Mr SUKIN has
14 been in severe, mind numbing pain, and has been required to
15 take narcotic and other pain medications, including through a
16 surgically inserted pain medications pump, to control the
17 pain. During this time, Mr SUKIN suffered severe
18 psychological distress, as his lack of disability benefits
19 caused him to sell first one family home, then sell a second,
20 replacement family home, remove his children from school and
21 move from the San Francisco Bay Area. As a direct result of
22 Mr SUKIN's severe pain, extensive pain medications, the above
23 misrepresentations and psychological distress, Mr SUKIN lacked
24 the mental capacity to have a full understanding of his
25 rights, and to deal with the Defendants' disability insurance
26 POLICY and Defendants' actions thereunder, and was not
27 mentally competent to understand the nature, purpose and
28 effect of the POLICY, Plaintiff's obligations (if any), and
29 Defendants' action under the POLICY. As a direct and
30 proximate result of STATE FARM MUTUAL AUTOMOBILE INSURANCE
31 COMPANY, STATE FARM INSURANCE COMPANIES' continuing to adjust
32 Plaintiff's claim, Plaintiff's aforesaid lack of mental
33 capacity, and the above misrepresentations, Plaintiff deferred
34 filing suit.

35 Doc #1, Ex 1 ¶16. Based on this pleading, Sukin argues that the
36 limitations period for his claim against DOI should be tolled under
37 Cal CCP § 352, which states: "If a person entitled to bring an
38 action, * * * is, at the time the cause of action accrued either

1 under the age of majority or insane, the time of the disability is
2 not part of the time limited for the commencement of the action."
3 Cal CCP § 352(a).

4 "For purposes of Code of Civil Procedure section 352, a
5 plaintiff is 'insane' if 'incapable of caring for his [or her]
6 property or transacting business or understanding the nature or
7 effects of his [or her] acts * * *'" Alcott Rehabilitation
8 Hospital v Superior Court, 93 Cal App 4th 94, 101 (2001) (citing
9 Pearl v Pearl, 177 Cal 303, 307 (1918)). "The term 'insane', as
10 used in this connection, has been give a generic, rather than a
11 technical, meaning, * * * and the exception has been held to
12 embrace temporary unsoundness of mind as well as chronic or fixed
13 insanity.'" Gottesman v Simon, 169 Cal App 2d 494, 499 (1959).
14 "[T]he standard expressed in the cases, though often cast in terms
15 of 'mental derangement,' actually requires only some mental
16 condition which renders the plaintiff incapable." Feeley v
17 Southern Pacific Transportation Co, 234 Cal App 3d 949, 952-53
18 (1991).

19
20 State Farm argues that Sukin's allegations are
21 insufficient for tolling purposes because Sukin fails to plead
22 specifically that he was "incapable of caring for his property or
23 transacting business or understanding the nature or effects of his
24 acts." Doc #20 at 9. But the court finds that Sukin's complaint
25 sufficiently pleads tolling. "[T]he allegations of the complaint
26 must be liberally construed with a view to attaining substantial
27 justice among the parties." Heckendorn v City of San Marino, 42
28 Cal 3d 481, 486 (1986) (quoting Youngman v Nevada Irrigation Dist,

1 70 Cal 2d 240, 244-245 (1969)). The court also notes that "doubt
2 arising from merely inartful, ambiguous, or technically defective
3 pleadings should be resolved in favor of remand." Lewis v Time,
4 Inc, 83 FRD 455, 460 (ED Cal 1979).

5 As mentioned above, "the defendant must demonstrate that
6 there is no possibility that the plaintiff will be able to
7 establish a cause of action in state court against the alleged sham
8 defendant." Good v Prudential Ins Co of America, 5 F Supp 2d 804,
9 807 (ND Cal 1998). State Farm presents three pieces of evidence in
10 an attempt to make this showing. First, State Farm submits a
11 report prepared by Sukin's health care provider on March 18, 2003,
12 noting that: "Mr Sukin is actually doing somewhat better at work.
13 His behavior is gradually coming under control. He is working
14 extensively with Dr Rome. Overall, I am optimistic that Mr Sukin
15 will continue to show some significant improvement." Doc #21, Ex
16 1. But as Sukin points out, this document contains inadmissible
17 hearsay. Even if the court could consider the statement, it fails
18 to establish conclusively that Sukin was not suffering from a
19 condition of the mind that rendered him incapable for tolling
20 purposes.

21 State Farm also submits documents from its claim files
22 recording telephone conversations between State Farm and Sukin on
23 March 14, 2003, March 21, 2003, June 20, 2003, July 1, 2003 and
24 August 5, 2003. Id, Ex 2. These recordings show Sukin
25 communicating with State Farm about his claim for benefits. Id.
26 Finally, State Farm submits a letter dated January 30, 2004 sent to
27 State Farm from an attorney named Alfred Buchta who had been
28 "retained to represent the interests" of Sukin in connection with

1 his benefit claims under the policy. Id, Ex 3. Sukin argues that
2 these documents also contain inadmissible hearsay. The court
3 disagrees. See FRE 801(d)(2) (admissions by party-opponent or
4 agent of party-opponent are not hearsay); FRE 803(6) (business
5 records exception). But again, these documents fail to establish
6 conclusively that Sukin's claim against DOI was not tolled. Hiring
7 an attorney and communicating with an insurance company are not
8 clear and convincing proof of Sukin's capacity to care for his
9 property AND transact business AND understand the nature and effect
10 of his acts. It is feasible that a person would engage in these
11 acts without understanding their nature and effect. See Hsu v Mt
12 Zion Hospital, 259 Cal App 2d 562 (1968) ("[T]he basic question
13 [under Cal CCP § 352] is whether the allegedly insane plaintiff is
14 sufficiently aware of the nature or effects of his acts to be able
15 to comprehend such business transactions as the hiring of an
16 attorney and the instigation of a legal action.") Indeed, the
17 record of Sukin's August 5, 2003 call with State Farm shows Sukin
18 stating that "he [was] still in so much pain" and "he [did] not
19 have the strength right now to pursue a claim for his injuries" and
20 "he could not handle that right now." Doc #21, Ex 2 at 29-30.

21 State Farm argues that "a party who is represented by an
22 attorney cannot toll the period of limitations because he or she is
23 deemed to have constructive knowledge of the statute of limitations
24 governing distinct causes of action." Doc #20 at 12. State Farm
25 cites Associated Truck Parts, Inc, v Super Ct, 228 Cal App 3d 864,
26 867-70 (1991) and Pugh v State Farm Insurance Companies, 227 Cal
27 App 3d 816 (1991) for this proposition. But these cases address
28

whether an insurer had an obligation under Cal Ins Code §§ 11583 and 11580.2 to notify the insured of pertinent time limits after the insured had retained counsel. Under these sections of the Insurance Code, failure to provide notice of the applicable statute of limitations to a claimant who is unrepresented by counsel will toll the running of the statute. State Farm cites no cases, and the court was unable to find any, addressing whether an attorney's involvement ends the tolling of the limitations period in cases of mental incapacity. Indeed, the court can appreciate why an attorney would wait to file suit until his client fully understood the effect of that action.

Based on the above considerations, the court finds that Sukin's lawsuit is not barred by well-settled rules of existing state law. The court cannot conclude that DOI is a sham defendant, whose presence should be disregarded for purposes of establishing diversity jurisdiction. Because State Farm bears a heavy burden of establishing the presence of sham defendants, because Sukin has avowed his desire to seek individual liability against DOI and can, undoubtedly, so seek liability under Cal Ins Code § 10291.5, the court determines that State Farm has not carried its burden of demonstrating the existence of removal jurisdiction.

IV

The court, therefore, determines that State Farm has not satisfied its burden of demonstrating that DOI is a sham defendant. As a result, this matter must be remanded to state court, as complete diversity of citizenship is lacking. The court's decision

1 to remand renders moot State Farm's motion to dismiss, which may be
2 taken up in state court. The court declines, however, to award
3 fees and costs to Sukin. Although the court has determined that
4 removal was not proper, State Farm's removal notice was not
5 unreasonable.

6 In sum, Sukin's motion to remand (Doc #14) is GRANTED.
7 State Farm's motion to dismiss (Doc #3) is TERMINATED as moot. The
8 court ORDERS this matter to be REMANDED to San Francisco superior
9 court. The clerk is DIRECTED to close the file and terminate all
10 pending motions.

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13 IT IS SO ORDERED.

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15
16 VAUGHN R WALKER

17 United States District Chief Judge
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